

STATE OF VERMONT
DEPARTMENT OF EDUCATION

Special Education
Case #DP05-09

Due Process Hearing

**FINDINGS OF FACT
CONCLUSIONS OF LAW AND
ORDER**

INTRODUCTION

A request for a due process hearing was filed by the parents on May 26, 2005. Due to family obligations of the parents, the hearing was delayed until mid-July, 2005. As a result, this hearing officer granted an extension of the 45 Day Rule until August 31, 2005. The hearing was held on July 13 and 14, 2005. The parents represented themselves and the student, and Georgiana Miranda, Esq. represented the school district (hereafter “the district”).

ISSUE

The issue is whether the location proposed by the district for implementing the student’s 4/13/05 – 4/13/06 IEP is appropriate.

FINDINGS OF FACT

1. The student is twelve years old and has been diagnosed with autism. He has been receiving special education services since 1996. (District Exhibit (hereafter “D. Ex.”) #152; Testimony of special education (hereafter “sped”) coordinator).
2. There is a history of conflict between the district and the parents that includes disputes, misunderstandings, allegations and mistrust. (Testimony of parent; Testimony of sped coordinator; Testimony of principal; Testimony of consultant; Testimony of facilitator).
3. The student has not attended his community public school for the past two years. He was home schooled for the 2003-2004 and 2004-2005 school years and he received services from several providers. (Testimony of the sped coordinator; Testimony of parent).

4. In September of 2004, a consultant at the Vermont Department of Education contacted the district to ask if someone was needed to facilitate interactions between the district and the parents in developing a program for the student. The district indicated that assistance was needed and the Department consultant became the facilitator of the effort to develop the student's program. (Testimony of the sped coordinator).

5. The facilitator suggested that the district hire a consultant to assist the in drafting of the student's program. At the request of the facilitator, the district and parents listed candidates that would be acceptable. In late October 2004, the person identified by both the district and the parents was chosen to be the consultant by the facilitator. The sped coordinator was made aware of the facilitator's choice in November 2004. (Testimony of sped coordinator; Testimony of facilitator; Testimony of consultant; D. Ex. #191).

6. The sped coordinator conditioned the facilitator's choice of the consultant on the consultant's ability to be independent. (Testimony of the sped coordinator).

7. Initially, the consultant was reluctant to take the job because of the contentiousness of the relationship between district and the parents but she was persuaded to by the facilitator who said he would act as a mediator with the district. (Testimony of the facilitator; Testimony of consultant).

8. The consultant had worked with the student's Individual Education Plan (hereafter "IEP") Team several years earlier as a team facilitator to help resolve issues and move the program ahead. (Testimony of consultant).

9. The consultant's initial understanding of her arrangement with the district which she gained from the facilitator was that she would develop educational program recommendations for the student. The facilitator agreed to be the bridge between the consultant and the district because the consultant did not have time to communicate with the district on a daily basis and because of the historical difficulties between the parties. Her role was to be purely that of a consultant and her communication with the district would be through the facilitator. (Testimony of consultant; Testimony of facilitator; D. Ex. #199).

10. The consultant was initially asked by the sped coordinator to do a record review of the student. Because there were several people who had been hired by the parents to work with the student during the time he was home schooled, the consultant felt their input was a necessary part of developing appropriate program recommendations. She discussed this addition to her work with the facilitator and assumed he would discuss it with the sped coordinator. The facilitator can not remember if he communicated with the sped coordinator about the consultant's need for information beyond the record review. When the core planning started to meet, the facilitator did not pass any information on to the district. (Testimony of consultant; Testimony of facilitator).

11. The consultant brought together a core planning team that included the speech language pathologist, occupational therapist and special educator currently working with the student, the parents and the consultant. The consultant could not do her work in a vacuum. In order to focus on the student, she needed to talk to the parents and the people who were working with him. (D. Ex. #229; Testimony of the facilitator).

12. Based upon what she believed to be the sped coordinator's charge to draft recommendations for the student's program, the consultant developed a five phase proposal. This proposal took the form of an e-mail to the facilitator. The participants in the core planning team were listed as the student's speech/language pathologist, occupational therapist, the consultant, the parents and a special educator. A meeting date was identified for each phase of the proposal. The plan included: Phase 1 – November 22, 2004 - file review and recommendations for working sessions; Phase 2 – November 30, 2004 (proposed date)- meeting of core planning team to discuss the team's goal, review the student's needs and progress, decide on goals and objectives and discuss learning environment and staffing needs; Phase 3 – December 4, 2004 (proposed date) - meeting of core planning team to review progress, discuss such things as team communication and coordination, assessment and evaluation, discuss IEP team meeting date, summarize Program Model and Handbook; Phase 4 - IEP Meeting; Phase 5 - meeting of core team to develop lesson plans for each IEP goal, including where it will be taught, instructional method to be used and assessment; and, Phase 6 – Implementation. (D. Ex. #229-231; Testimony of consultant).

13. A copy of the consultant's proposal was e-mailed to the sped coordinator on November 23, 2004 by the facilitator. (D. Ex. #229-231).

14. There is no evidence that the sped coordinator or anyone else from the district objected to the consultant's proposal or the list of participants on the core planning team.

15. On December 7, 2004, the facilitator e-mailed the sped coordinator the consultant's estimated budget for the proposal through Phase 5. (D. Ex. #233 and #234).

16. A meeting of the sped coordinator, the principal, the facilitator and the consultant took place on December 12, 2005 to discuss the consultant's proposal and set direction for the future. The sped coordinator's understanding was that the consultant would talk to the parents and the school and develop a proposal. The facilitator indicated that initially there was some miscommunication on his part with the consultant who thought she would be communicating with the district through the facilitator. The facilitator would continue to communicate with the district. The consultant had been in contact with the family and had done some preliminary work with the staff currently providing services to the student. (D. Ex. #101).

17. The consultant developed a modified proposal which was e-mailed by the facilitator to the sped coordinator on January 21, 2005. The modifications were the result of a conversation between the facilitator, the consultant and a service provider from Upper Valley Services (hereafter "UVS"). At that time, the student's program was to be administered by UVS and implemented at the community school, at home and in the community. (D. Ex. #235 and #236).

18. The modified proposal is a comprehensive educational program based on the student's needs that would be implemented in three settings: school, home and community. (D. Ex. #110 and #235).

19. Between February and April 2005 there were discussions about UVS, Sterling Area Services (hereafter "SAS"), Jakes' Place, the district's Middle/High School, the hospital and the South Barre site as possible locations for implementing the student's program. The consultant thought the middle/high school made sense because the structure would be kinder for the student and it would provide a fresh start. (D. Ex. #117 - #119, #121, #128, #135 - #144, #149).

20. The sped coordinator explored several sites discussed for the student's program. During this time, it became clear that there was no space available at UVS. The hospital also did not have an area available for such a program. Space at the middle/high school was tight and the technical college had access to the library but it was only available on a short term basis. (Testimony of sped coordinator).

21. Jake's Place is located in a building in the student's community and has been used regularly by him in the past. The district believes it may not be an appropriate site for the student, the stairs are narrow and steep, and it is small and isolated. In addition, the district does not want to fund Jake's Place as it would set a precedent for others. (D. Ex. #121; D. Ex. 200; Testimony of sped coordinator)

22. In late March 2005, the director of SAS met with the sped coordinator and learned that the district wanted SAS to provide the student's services. SAS was developing an alternative educational site in South Barre for up to four children. The director wanted the consultant to visit the site and let him know whether, in her opinion, the site would work for the student. (D. Ex. #132).

23. During this time, the consultant's work, which had involved looking at the student's needs and developing goals and objectives for a home/school/community program, came to a premature end and took on another direction focused on developing a service plan for SAS. (Testimony of the consultant).

24. At the Educational Planning Team meeting on April 13, 2005 the sped coordinator gave a description of the house in South Barre that would be the alternative educational site. Transporting the student to the South Barre location by taxi or bus, possibly with an aide, was also discussed. One parent stated that she was in agreement with the IEP services but not the South Barre location for implementation. The other parent expressed concern about the transportation to South Barre. (D. Ex. ##133-139; Testimony of sped coordinator).

25. Transportation to the South Barre location would take 20-25 minutes and would be funded by the district. (Testimony of SAS director; D. Ex. #140).

26. The South Barre site is a public building that meets code and is very private. It is a three level house with approximately six rooms; two upstairs rooms, a living room, a kitchen, one and a half bathrooms, a porch, an exercise room and a backyard. The stairs, basement and windows need minor renovations (Testimony of principal; Testimony of sped coordinator; D. Ex. #139).

27. Initially, the consultant suggested that the parents try placing the student at the South Barre location. However, after she gathered more information from the director and the SAS case manager, she changed her mind and decided that it would not be appropriate. The parents were at first willing to give South Barre a try for a few days but after learning more about it, decided it would not be appropriate. (Testimony of consultant; Testimony of facilitator; Testimony of parent).

28. There would be two children with autism at the South Barre location in addition to the student. One is verbal and the other non-verbal. Both of these children are more disabled than the student. There would be no non-disabled children at the site. (D. Ex. #141; Testimony of SAS director; Testimony of consultant).

29. Another school district had considered placing a child with violent behavior at the South Barre site but it was decided that he would be placed elsewhere. (Testimony of SAS director; Testimony of parent).

30. SAS could provide the student's IEP services at the South Barre location or at a location in the student's home town. (Testimony of SAS director; testimony of facilitator).

31. The student's core deficit is in the social and pragmatic communication, conceptualization area. (Testimony of the consultant).

32. The student should be educated in or as close to his home community as possible. He should not be in a program with children who do not have the conversational and social reciprocity skills that he needs in order to develop. (Testimony of the consultant).

33. The student is visually aware and astute. He is hyper vigilant and learns from what he watches. What he would see at the South Barre location, in

terms of modeling behavior from other children is not what the student needs. (Testimony of consultant).

34. To place the student in the South Barre self-contained program with children who are more disabled than he in his core deficit areas as well cognitive areas would be detrimental for the student. (Testimony of consultant).

35. If the student were in a community-based program, he would have easy access to a school with non-disabled peers as well as to his community. The lack of easy access to his school and community that would exist if he were at the South Barre location would create isolation for the student. (Testimony of consultant).

36. The student needs work in academics and basic skill areas, in related services areas such as motor planning and impulsivity. He needs to work in his community and social realm. He also needs his core deficits addressed. The vehicle for this work is a three point program: time in his community school; time in his community learning about his community and how to function in it as independently as possible; and, time at home where there is support for his interests, his adaptive skills, his strengths and his life. (Testimony of consultant).

37. A base that is safe needs to found for the student within his community. The exact location in the community of the site is not important but it needs to meet the following standards:

1. that the student remains close to his home community so that he can access it easily by walking or taking short rides;
2. that the student have easy access to typical peers who can be role models for the social behavior skills that he needs to learn and practice;
3. that he participates in activities selected by the IEP Team as a means of keeping him connected with his peer group some of whom will probably communicate with him as an adult.

(Testimony of the consultant; D. Ex. #200; D. Ex. #219).

38. Everyone agrees that the student should be in school with his typically developing peers for some part of the day. The sped coordinator believes that the South Barre location is only temporary and transition meetings to develop a transition plan to bring the student back to his community school

would begin in October 2005. The student's transition might go quickly but, because each move will need to be evaluated and worked through carefully, the consultant's prediction is that the transition process will be slow. (Testimony of consultant; Testimony of sped coordinator).

39. The district did not ask the consultant for her thoughts or opinion about placing the student at the South Barre location. (Testimony of consultant).

40. The consultant eventually became aware that her understanding of her arrangement with the district was somewhat different than that of the sped coordinator's. (Testimony of consultant).

41. The consultant has a reputation in the state as someone with significant expertise in the area of children with developmental delays. (Testimony of facilitator).

42. The consultant's work on the student's program was thoughtful and was developed with input from different people over time, a process which allowed her to make recommendations about the student's IEP. (Testimony of facilitator).

43. The sped coordinator believes that placing the student at the South Barre location would be less costly than placing him at a site in his community, would be safer and would be less isolating. He believes there are no negative aspects of the student going to the South Barre location. (Testimony of sped coordinator).

44. It would be challenging to place the student in his community school for part of the day. (Testimony of sped coordinator).

45. The student belongs in his community and at his community school. He will be able to be successful in his school with proper support. This process needs to begin as soon as possible. (Testimony of consultant; Testimony of parent).

46. In the end, the sped coordinator thought the consultant had not been independent because: she did not contact the school before beginning her work; the proposal she presented in November 2004 did not include the school; the sped coordinator had not seen the work product from the people working with the student since he had been home schooled nor had he seen

their opinion as to his current status; and, she had written an e-mail to the facilitator indicating that she was not looking forward to talking to the sped coordinator without a third party present. The sped coordinator concluded that if he had known that the consultant was not going to be independent, he would not have put her on the list of acceptable candidates that was given to the facilitator. (Testimony of the sped coordinator; D. Ex.#120).

47. It has become apparent that there were communication lapses and misunderstandings during the time the consultant worked on the student's program. The consultant would have agreed to meet with the sped coordinator to discuss any communication problems the district was having with her had the facilitator recommended it. Neither the district nor the facilitator ever raised the issue of communication difficulties with the consultant during her work on the student's program. (Testimony of consultant).

48. I find the consultant's opinion about the appropriateness of the South Barre location both credible and persuasive.

CONCLUSION OF LAW

The sole issue in this case is whether the South Barre location proposed by the district is an appropriate site for the implementation of the student's 2005-2006 IEP services. The district supports its position that the South Barre location is appropriate with four arguments. The first, and most significant, is that the consultant was compromised. If the consultant, whose position is that the South Barre location is not appropriate, is determined not to be objective or credible, then her opinion should be given little or no weight and the other arguments, parental preference, district responsibility and district determination of location must be addressed. If, however, it is decided that the South Barre location is not appropriate, then it will not be necessary to consider the remaining arguments.

The district contends that the consultant hired in the fall of 2004 to develop recommendations for the student's program was not independent or objective and, as a result, her recommendations were compromised. The district attempts to establish the consultant's lack of objectivity by pointing to e-mails that contradict one of her statements. The district contends that the consultant's statement that she would only work on the student's program if

she did not also have to deal with the district because she did not have the time was not credible. The district contends there are e-mails that contradict her stated reason for not being able to deal with the district. The district does not identify which e-mails it is referring to other than to say that they were shared with the SAS director and the facilitator. There are many e-mails between the consultant, the facilitator and the SAS director. By a process of elimination, it would appear that the district is referring to the consultant's e-mail to the facilitator in which she states that she is not looking forward to speaking to the sped coordinator especially without a third party present for verification and support. (D. Ex. #120)

This e-mail was sent by the consultant to the facilitator on March 9, 2005, approximately three months after she began her work. The district appears to be using this e-mail to support its position that the real reason the consultant tried to avoid dealing with the district was because she did not want to talk to the sped coordinator not because she did not have time. It is not clear in this or other e-mails exactly why the consultant was not looking forward to the conversation, but it may well have been because of the long history of parent/district conflict or that there was a particularly difficult issue that needed to be discussed. It is also the case, that two days after this e-mail, the consultant had a telephone conversation with the sped coordinator and reported to the SAS director that: the sped coordinator did not want her to be included in a conference call with the SAS director later that day; they talked about the consultation issue (which may have been the source of her reluctance); and, the sped coordinator was not very forthcoming with her. (D.Ex. #128).

The first problem is that the district does not identify the source of the supposed contradiction. Without any certainty about which e-mail the district is referencing, it is difficult to give any weight to this argument. In addition, if the e-mails discussed above are the ones to which the district is referring, they establish that, on March 9, 2005, the consultant was not eager to talk to the sped coordinator presumably about a specific topic without the presence of a third party. Given the contentious nature of the parties' history, it seems reasonable that a discussion about a difficult issue should be verified. Also, the call to the sped director two days later at least raises the question of who was reluctant to talk to whom. Another problem for the district is its misstatement of the consultant's testimony. She did not say that she did not want to deal with the district. She said she wanted the facilitator to be the bridge between herself and the district because she did not have

time for frequent communication with the district and because of historical difficulties with the school/parent relationship.

The previously referred to unidentified e-mail sent months after the consultant's work started does not contradict her stated reasons for wanting a third party link between herself and the district during what turned out to be a difficult process. Instead, it appears to have been a wise request that, had it worked, might have avoided this hearing.

Next, the district turns its focus to another aspect of what it believes establishes the consultant's lack of objectivity, her failure to review the district records regarding the student and have someone from the district on the core planning team. To support its position, the district cites *Franklin Northwest Supervisory Union and Sheldon School District*, 34 IDELR 74 (2001). The hearing officer in *Franklin*, was critical of some independent evaluators for not obtaining input from teachers and special educators when evaluating a child. He felt that, if an imbalanced evaluation was produced, it should be afforded significantly less weight. Reliance on *Franklin* as well as *Barre Town School District*, 29 LDELR 521 (1998) is misguided. As in *Franklin*, it was an evaluation of a child that was at issue in *Barre Town*, not IEP recommendations. In addition, the children in *Franklin* and *Barre Town*, unlike the student in this case, were attending public school at the time of the evaluation. Because the student in this case had not been in school for two years, the records for that time period would presumably be in the hands of the parents and not the district.

The IEP recommendations requested of the consultant would not require as much information from anyone including the student as the evaluations that were being conducted in both *Franklin* and *Barre Town*. A record review would only be the beginning of the evaluation process. The difference in work required distinguishes these two cases from the case at hand and renders their rationale, regarding the lack of deference to be given to the evaluators, inapplicable here. In addition, when the consultant was selected to work on the student's program, it was the district that requested only a review of the student's records before she developed her recommendations. At the time, they apparently felt that nothing else was required.

The district also argues that the consultant's lack of objectivity is demonstrated by her review of the parent's records of the student not the

district's. According to the district, the consultant ignored the district's records pertaining to the years before the student left school. There is no evidence that, at the time the district asked the consultant to review the student's records, they provided her with the records they wanted her to consider. In the consultant's judgment, the records provided by the parents, which presumably covered at least the previous two years, were sufficient for her purposes. This does not appear to be unreasonable. These facts do not support a showing of bias on the part of the consultant but rather practicality and efficiency.

It was the consultant who, in addition to the record review, felt it was necessary to include the student's current teachers in the process of drafting appropriate recommendations. Now, the district is arguing that the consultant needed to have someone from the district on the core planning team as a means of showing her objectivity. In November of 2004, the facilitator sent the district's sped coordinator copies of e-mails listing the core planning team participants. There is no evidence that the district, at any time before this hearing, objected to the absence of its personnel on the team.

Included in the list of what the district believes to be illustrations of the consultant's lack of objectivity are: that she did not provide the district with information about the student's progress while working with the current providers; that she was available to testify as the parent's witness at the due process hearing; and, that she was inflexible in her support of the parent's position that the student's program should be implemented in the community. These examples of purported bias are not credible.

The consultant had no reason to give the district information about the student's progress. It was not part of what she had been asked to do as a consultant. Moreover, it would have been reasonable for her to believe that the district may have already obtained this information. That the consultant testified as a witness for the parents has nothing to do with her objectivity during the recommendation process. It is a reasonable outcome given that the district did not agree with her opinion of the South Barre location and the parents did. The consultant did not, as the district contends, give inflexible support to the parent's position. The consultant arrived at her own opinion, one that the parents supported and the district did not. The district seems to argue that the consultant should have become more flexible and changed her opinion when it became clear that finding a location in the community might

be difficult. Holding the opinion that one location is not appropriate does not change merely because finding another location would not be easy.

Finally, the district cites two cases, *Watson v. Kingston City School District*, 41 IDELR 181 (N.D. NY 2004) and *County School Board of Henrico County v. Palkovics*, 40 IDELR 13 (E.D. VA 2003), to support the contention that a school's decisions concerning methodology must be given deference whereas recommendations of experts hired by parents should not. In this case, methodology is not an issue. The parties do not disagree about the IEP services or methodology, they only disagree about where they should be provided. Furthermore, the consultant was not an expert separately hired by the parents. She was identified by the district, as well as the parents, as a consultant they would accept to work on the student's program. The consultant was chosen because she was the only person on both lists. She was paid for her work by the district. The underlying facts in *Watson* and *Henrico County*, namely methodology decisions and experts hired by parents, do not exist in this case, and the holdings in those cases should have no bearing on the outcome here.

The arguments presented by the district in its effort to establish the consultant's lack of objectivity and independence are not persuasive. The evidence shows that she worked efficiently and diligently on the student's behalf. The consultant was not compromised, when, in January 2005, she developed a revised proposal to, among other things, have his program implemented in his school, home and community. Moreover, there is no evidence that the district was displeased with any of the consultant's work until after it became clear that this recommendation would not be possible if the student were placed at South Barre.

In the consultant's opinion, meeting the student's needs requires a three point community-based program with: time in his community to access it easily by walking and taking short rides and to learn about how to function in it as independently as possible; time in his community school to have easy access to his non-disabled peers who provide role models for social behavior skills and to participate in activities that keep him connected to peers with whom he will probably communicate as an adult; and, time at home to provide support for his interests, his adaptive skills, his strengths and his life. The community and school requirements of this program do not provide the student with the best possible services or instruction available but they contribute significantly to a program designed to provide him with

educational benefit and a basic floor of opportunity. *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 200-201 (1982). Given the student's core deficits of social and pragmatic communication and conceptualization, it is critical that much of the student's program be implemented in his community if he is ever to function there with a degree of independence. It is the combination of access and support provided by his school and home that will make functioning alone in his community a possibility.

Having established what the student needs, we must now look at the South Barre location to determine if it meets these needs. The South Barre location is about 20-25 minutes from the student's home. The student would travel there by bus or taxi with or without an aide and the district would fund the transportation. The building to be used by SAS in South Barre is very private, with approximately 6 rooms, a porch and a yard. The consultant and the parents were concerned about the length of the trip to South Barre, but it was not the primary concern. When the consultant obtained information about other children who would also be at the location, her concern increased significantly.

The two other children who would be at the South Barre location are more disabled than the student in his core deficit areas as well as cognitively. The student is astute, hyper-vigilant, visually aware and he learns from what he watches. To place him in a self-contained program, with children whose deficits are greater than his, would be detrimental for the student. If the student were in a separate area for part of the day, his interaction with the other children would be reduced but he would not be interacting with any peers. It is significant that the entire time he is at South Barre, the student would have no interaction with non-disabled peers. Although there is consensus on the need to transition the student back to his community school, the reality is that, if he were at South Barre, he could not attend school at various times during the day that were deemed appropriate. Instead, it would only make sense, given the travel time, to have him at school at one end of the day or the other and this limitation might well add time to the transition process.

The district's belief that there is nothing negative about placing the student at South Barre completely ignores the credible evidence that two critical needs, community access and non-disabled peer interaction, would be absent. More importantly, placing him there would be detrimental. The

South Barre location would not meet his most important needs and would not provide what is necessary for his growth and development. It would not provide him with the educational benefit he requires or a basic floor of opportunity. It is not an appropriate location.

Providing the student with a community based program would be, as the sped coordinator put it, a challenge, but it is possible. A continuing effort will be required on the part of the parents and the district to put aside, for the student's sake, a history of animosity and develop strategies that will make it possible to build an appropriate program.

ORDER

1. The district shall immediately convene a meeting for the purpose of finding a location in the community as a base for the student's program. If space in the Middle/High School or another site in the community is not immediately available, Jake's Place shall be used as the base until another location is found.
2. The district shall continue to use the facilitator to assist the parties in the process of developing a program for the student as long as facilitation is necessary.
3. The district shall retain an autism consultant to be on the team that continues to develop the student's program and his transition to his community school. If the parties are unable to agree on a consultant with the facilitator's assistance, the facilitator shall, as a last resort, select a consultant.

Dated at Hartland this 25th day of August, 2005.

Catherine C. Stern, Hearing Officer

Parties have a right to appeal the hearing decision by filing a civil action pursuant to 20 U.S.C. §1415(e). Such appeal must be commenced within ninety (90) days of the notice of this decision

